OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 95-8 June 6, 1995

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Collection Cases

The purpose of this memorandum is to set forth modified procedures with respect to the processing of "collection cases," that is, cases which involve an allegation that an employer has failed, in violation of Section 8(a)(5), to make contractually-required contributions to benefit funds, such as pension funds, health and welfare funds, vacation funds, etc.

Background:

In *Laborers Health and Welfare Trust Fund v. Advance Lightweight Concrete Co.,* 484 U.S. 539 (1988), the Supreme Court held that the Agency has exclusive jurisdiction over claims that an employer has unlawfully failed to make contributions into a benefit fund *after* expiration of the collective-bargaining agreement. On the other hand, alleged delinquencies occurring *during the life of the agreement* may either be raised under Section 8(a)(5) or be subject to a lawsuit in Federal court pursuant to the Employee Retirement Income Security Act (ERISA), or Section 301 of the NLRA.

Memorandum GC 88-4 (March 14, 1988) set forth the current policy for processing collection cases. It provided that where an alleged pre-expiration delinquency was the subject of a *pending* suit, the Region should defer further processing of the NLRB case pending the outcome of that suit.[1] If the alleged delinquency began during the life of the contract and continued after expiration, deferral was required as to any pending suit with respect to the pre-expiration delinquency.[2]

We have recently undertaken a thorough review of our policy in collection cases. As a result, I am reaffirming the policy of deferral to pending lawsuits under ERISA or Section 301, as applicable. In addition, as discussed below, the deferral policy will now be extended to all situations in which an alleged delinquency occurs during the life of an agreement, regardless of whether a suit is pending. Pursuant to *Advanced Lightweight*, the Agency will, of course, continue to have exclusive jurisdiction over alleged delinquencies arising after expiration of a contract.

The investigation and resolution of alleged delinquencies during the life of a contract have required considerable Agency staff time and resources, both in the field and headquarters, particularly at the post-complaint stage. In many instances, these cases have arisen in a context of employer financial distress or bankruptcy. The charging party unions or trust funds have looked to us to take the lead in collection efforts. However, the Agency's efforts often were unavailing due to the employer's financial situation, and yielded no monetary relief beyond what could be expected under ERISA or Section 301. This expenditure of Agency resources has come under closer scrutiny in face of increasingly limited Agency budgets and staffing.

New Policy

After careful consideration of the issues presented, I have decided that where there is concurrent relief available under either ERISA or Section 301, Regions should defer Section 8(a)(5) collection cases pending the results of that litigation. Effective with issuance of this memorandum, the following procedure will be employed:

1. When a charge alleges, in whole or part, that an employer violated Section 8(a)(5) by failing to make contractually required benefit payments, the Region should conduct preliminary investigation. If the charge clearly lacks merit (e.g., barred by 10(b); lack of evidence to support the alleged delinquency), it should be dismissed.

2. If there is at least arguable merit to the allegation of a failure to make contributions during the life of a collective-bargaining agreement, the charge should be deferred even if a suit has not yet been filed.[3] All other instructions in GC 88-4 and 88-8

remain in place.

3. Regions should be alert to situations involving recidivist employers. If the charged party employer is the subject of an outstanding Board order or court judgment involving the same conduct, deferral would not be appropriate, absent clearance from the Division of Operations-Management. If in any other situation, the Region believes that deferral is *not* warranted due to the circumstances of the case or the employer's prior history, clearance should be sought from Operations-Management.[4]

4. Charges in collection cases may also include other unfair labor practice allegations, including repudiation of a contract. Since deferral of the "collections" allegations could result in the charge being resolved in two or more forums,[5] deferral is not appropriate if the non-"collection" allegation is found to have merit.

5. If the alleged delinquency begins during the life of the contract and continues beyond expiration, we will continue the current policy, set forth in GC 88-4, of deferring to any *pending* lawsuit with respect to the pre-expiration delinquencies. However, we will not *require* parties to proceed to a suit with respect to the latter, as this would force them to proceed in two forums.

6. Regions should check periodically (i.e., approximately every 6 months) with the parties on the status of deferred cases, as is done now with respect to Collyer cases. Appropriate actions should be taken, including dismissal of cases in which no suit has been filed or is no longer being pursued.

7. Upon disposition of the lawsuit, the charging party is to be provided with an opportunity, similar to that for review of arbitration awards under *Spielberg Manufacturing Co.,* 112 NLRB 1080 (1955), to contend that the Agency should not defer to that disposition. Since the Agency would normally be collaterally estopped from proceeding where a Federal court has ruled on the substantive merits, the scope of this review will be more limited than under *Spielberg*. See *NLRB v. Donna-Lee Sportswear,* 836 F.2d 31, 33 (1st Cir. 1987) and NLRB v. Heyman, 541 F. 2d 796, 798 (9th Cir. 1976). As usual, Regions may submit close or doubtful issues to the Division of Advice.

Questions about this memorandum may be directed to your Assistant General Counsel.

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[1] Footnote 1 of GC 88-4 provided that "familiar *Collyer* concepts would be applied" to allegations of delinquencies during a contract. Regions should continue to apply *Collyer* where applicable, keeping in mind the caveat of footnote 1 that if "the employer does not raise a bona fide issue of contract interpretation, *Collyer* deferral would generally not be appropriate." See also *Stevens and Associates Construction Co.,* 307 NLRB 1403.

[2] Memorandum GC 88-8 (August 2, 1988) made it clear that GC 88-4 applied to delinquencies in any kind of benefit fund, not just pension funds, since the Court's reasoning in *Advanced Lightweight* was deemed applicable to benefit fund obligations in general. That position has not changed.

[3] As with *Collyer* deferral, this deferral action may be appealed to the Office of Appeals.

[4] In evaluating the employer's past history, Regions should consider any prior charges which were deferred pursuant to this memo or GC 88-4 and 88-8.

[5] In *Sheet Metal Workers Local 17 (Koch)*, 199 NLRB 166, at 168, the Board held that where one part of a case was deferrable and the other(s) not, deferral was not appropriate in order to "avoid litigating the same issues in a multiplicity of forums." While that case related to *Collyer* deferral, the same principle is applicable herein.